No. 76-971

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDRE WILLIS KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1976. The petition for a writ of certiorari was filed on January 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of videotaped depositions of two government witnesses who were unavailable at trial violated the Confrontation Clause of the Sixth Amendment.

2. Whether the district court was required to give a limiting instruction during the course of the trial regarding the use of co-conspirator statements.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to import heroin unlawfully into the United States and to possess and distribute heroin, in violation of 21 U.S.C. 846 and 963 (Count I), and of two counts of unlawful distribution of heroin intended for importation into the United States, in violation of 21 U.S.C. 959 (Counts III and IV). He was sentenced to 15 years' imprisonment on Count I to be followed by a special parole term of nine years, and to ten years' imprisonment on each of Counts III and IV, to be followed by a special parole term of five years. The sentences imposed on Counts III and IV were concurrent to each other but consecutive to that imposed on Count I. The court of appeals affirmed (Pet. App. A).

The evidence at trial, the sufficiency of which petitioner does not dispute, revealed a scheme under which petitioner and other persons obtained heroin in Thailand, transported it through military cargo channels to Japan, and reshipped it from Japan to the United States for ultimate distribution.[1] Petitioner took part in planning the illegal operation, assisted in concealing shipments of heroin on the person of a courier, Gamble, picked up shipments of heroin on their

[1]Petitioner and three others—Kearney, Lemon and Powell—were indicted as co-conspirators; several other persons were named as unindicted co-conspirators. At the first trial, Powell and Lemon were convicted on various counts, but the jury was unable to reach a verdict as to the other counts and defendants. On retrial the jury acquitted Kearney but convicted petitioner and the other defendants on the remaining counts (Pet. App. 2).

arrival in Japan from Thailand, flew to the United States to oversee the sale of the heroin, and shared substantially in the proceeds of the operation.

The government's proof rested in substantial part upon the testimony of two unindicted co-conspirators, Adams and Gamble. Neither of those witnesses was available to testify at trial because both were serving terms of imprisonment at Yokosuka Prison in Japan for violations of Japanese narcotics laws (Pet. App. 4).[2] On October 25, 1974, therefore, the government moved pursuant to 18 U.S.C. 3503 for leave to take videotaped depositions of Adams and Gamble in Japan (R. 12-24).[3] The district court granted the motion (R. 57-60), and the defendants and their counsel, including petitioner, traveled to Japan at government expense to participate in the depositions, which were set to be taken before an American consular officer at Yokosuka Prison. The Japanese government had, however, imposed certain restrictions on the defendants' movements while in Japan and on the deposition procedure.[4] The court of appeals described these restrictions and the deposition procedure as follows (Pet. App. 6-8):

[2]Subpoenas had been served upon Adams and Gamble at Yokosuka Prison, but the prison warden would not permit the two men to travel to the United States to honor the subpoenas (Pet. App. 4 n. 2).

[3]The statute is set out at Pet. App. 4-6 n. 3.

[4]As the court of appeals noted (Pet. App. 16 n. 10), the Japanese officials were apparently concerned with the flow of illegal narcotics traffic through their country and with the prior involvement of the defendants in that traffic. Defendant Powell had been convicted *in absentia* in Japanese court on September 14, 1972, of the felony of unlawfully possessing morphine, and petitioner had been arrested by the Japanese authorities on August 31, 1972, for possessing 34 grams of heroin (R. 386).

[The Japanese government] required that the defendants arrive together no earlier than January 20, 1975, and that the depositions begin the next day, though defense counsel protested that more time was needed to investigate and prepare for cross-examination. Defendants were taken from the airport to rooms prepared for them and they were guarded throughout their entire stay. They were confined to their rooms except for the trips to the prison for the deposition sessions, and they were not allowed to telephone or otherwise communicate with anyone else in Japan. They and their room were frequently searched. They could confer with their attorneys initially only in their own rooms, but subsequently in counsel's rooms as well. There were also rooms set aside for consultation purposes at the prison. The defendants and their attorneys could not speak privately with the deponents prior to their examinations, and a rigid daily schedule was set for the depositions.

Defense counsel vigorously objected to these conditions, and American consular officials attempted to have them relaxed, but the Japanese government would not relent. Claiming that the circumstances were intolerable, defendants and their counsel withdrew on the fourth day during the Adams' deposition and returned to the United States. The Government continued under the restrictions, taking the remainder of Adams' deposition and all of Gamble's after the defense's departure.

The district court admitted the deposition videotapes over petitioner's objections, and the court of appeals upheld their admission in a thorough opinion upon whch we rely (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 20-24) that the introduction of Adams' and Gamble's depositions violated the Confrontation Clause of the Sixth Amendment. He asserts first that depositions "can never meet confrontation requirements" and thus that 18 U.S.C. 3503 and Fed. R. Crim. P. 15 are unconstitutional on their face (Pet. 22). As the court of appeals held, however (Pet. App. 8-13), that contention is contrary to a long line of decisions of this Court beginning with *Mattox* v. *United States*, 156 U.S. 237, and extending to *Mancusi* v. *Stubbs*, 408 U.S. 204, where the Court held that the introduction of testimony given at an earlier trial of the defendant by a witness no longer in the country did not violate the Confrontation Clause so long as the witness was unavailable to testify at the second trial. See also *California* v. *Green*, 399 U.S. 149, 165-166.

In accordance with the principles of those cases, 18 U.S.C. 3503(f) conditions use of the deposition at trial upon a prior showing that the deponent is unavailable to testify at trial. Moreover, the statute affords a defendant the right to be present (at government expense) at the taking of the deposition, to be represented there by counsel, and to exercise full rights of cross-examination. It therefore clearly satisfies the constitutional standard. See *United States* v. *Ricketson*, 498 F. 2d 367 (C.A. 7), certiorari denied, 419 U.S. 965; *United States* v. *Singleton*, 460 F. 2d 1148 (C.A. 2), certiorari denied, 410 U.S. 984; *United States* v. *Carter*, 493 F. 2d 704 (C.A. 2).

Petitioner argues, however, that the circumstances in which the depositions were taken in this case effectively deprived him of the right to cross-examine the deponents and asserts that the combination of "intimidating circumstances surrounding the depositions" and the space

and time restrictions imposed on the deposition format made it impossible for defense counsel to ask "informed and intelligent questions—based on an adequate opportunity to investigate and discuss testimony with the accused" (Pet. 12, 24).

Petitioner's various complaints about the circumstances surrounding the depositions do not demonstrate a deprivation of his right to confrontation and were correctly rejected by the court of appeals, which held that "[w]hile the situation may not have been ideal, the defects do not approach constitutional infirmity" (Pet. App. 15).[5] The objection that the defendants did not learn until their arrival in Japan that they would not have the time they desired to conduct a pre-deposition investigation there (Pet. 22) overlooks the fact that the arrival and deposition schedules were imposed by the Japanese government and were beyond the control of the United States government, as the unsuccessful attempts to persuade the Japanese to relax their requirements demonstrate. Moreover, as the court of appeals noted (Pet. App. 17), criminal defendants, even in the United States, have no constitutional right personally to conduct pre-trial investigations, and defense counsel, who had been aware of the government's intention to depose the witnesses for two months, had ample time and freedom from restraint to conduct whatever investigation in Japan they deemed appropriate.[6]

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[5]This argument, moreover, involves an essentially factual issue which two lower courts have already resolved against petitioner; there is no reason for this Court to review those determinations. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

[6]Furthermore, the government paid for counsel's travel expenses. Petitioner's claim that his counsel was dependent on "petitioner's familiarity with the language and relevant locales in Japan" (Pet. 22) simply asserts a type of difficulty that frequently confronts defendants and their counsel, even in the United States, but does not establish a constitutional deprivation or a constitutional right of defendants charged with conduct occurring in part outside the country freely to accompany their lawyers in wide-ranging investigations around the globe. Moreover, the claim must be viewed in light of the fact that petitioner and two of his co-defendants were married to Japanese nationals and had relatives by marriage living in Japan (R. 388).

Petitioner's dissatisfaction with the ambiance of Japanese interrogation rooms and hotel facilities (Pet. 23-24) does not demonstrate that petitioner and his counsel were restrained from cross-examining the witnesses as fully as they desired. The hearing officer imposed no limitations on the number or type of questions defense counsel could ask.[7] Moreover, the prosecutors worked under the same conditions as the defense, and, contrary to petitioner's suggestion (Pet. 24), conference rooms were set aside for the defense team at the prison, where the defendants and their counsel conferred privately during the depositions (R. 401).[8]

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[7]Petitioner alleges that the hearing officer "refused to rule on objections" (Pet. 24). But the district court later ruled on the objections, sustaining some and overruling others (R. 436-440). Moreover, the deferral of ruling on the objections was of considerable potential benefit to the defense, as the court of appeals noted (Pet. App. 18-19): "[D]eposition cross-examination is potentially broader and more revealing for purposes of discovery than trial testimony because the hearing officer merely records objections for later ruling by the court; the deponent is permitted to answer subject to later striking. Fed. R. Civ. P. 30(c)."

[8]Furthermore, as the court of appeals noted (Pet. App. 7), while the defendants initially could confer with their counsel only at the hotel in their own rooms, they were subsequently permitted to confer in counsel's rooms as well, and, contrary to petitioner's assertion (Pet. 23), to confer there privately. And as the court of appeals correctly held (Pet. App. 17), there is no basis in the record to support petitioner's "opinion" (Pet. 13, 23) that it was unsafe to confer either at the prison or the hotel for fear of electronic eavesdropping.

In short, the procedures used in this case complied with 18 U.S.C. 3503 and did not deprive petitioner of his constitutional right to confrontation. Indeed, since the use of videotapes in this case enabled the jury not only to hear the witness' testimony but also to observe their demeanor, the procedures were at least as consistent with the Sixth Amendment as the mere reading of prior testimony of an unavailable witness, which this Court upheld in *Mancusi* v. *Stubbs, supra.*

2. a. Petitioner contends (Pet. 25) that the trial court erred in failing to instruct the jury, before the introduction of statements by petitioner's co-conspirators, that it could not consider the statements as evidence against petitioner unless the trial disclosed evidence independent of the statements that established the existence of the conspiracy and each defendant's participation in it beyond a reasonable doubt (see Pet. App. 32 n. 21). The trial court gave such an instruction at the conclusion of the trial, but petitioner insists that the court erred in not giving the instruction before the statements were admitted.

The court of appeals correctly rejected petitioner's claim. First, whether co-conspirator statements are admissible is an evidentiary question to be determined by the trial court, and the admissibility of such statements turns upon the court's determination whether independent evidence adequately establishes the existence of the conspiracy and the defendant's participation in it.[10] Fed. R. Evid. 104(a),

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[10]While the circuits are somewhat in conflict with respect to the quantum of independent evidence necessary to permit the admission of co-conspirator statements (compare, *e.g., United States* v. *Vaught*, 485 F. 2d 320 (C.A. 4), and *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953, with *United States* v. *Wiley*, 519 F. 2d 1348, 1350-1351 (C.A. 2), certiorari denied *sub nom. James* v. *United States*, 423 U.S. 1058, and *United States* v. *Trotter*, 529 F. 2d 806, 812

801(d)(2)(E). Accordingly, as the Ninth Circuit held in *Carbo* v. *United States*, 314 F. 2d 718, certiorari denied, 377 U.S. 953, if the trial court determines that the statements are admissible it is not required to instruct the jury at all concerning the quantum of proof necessary to permit the statements to be considered.

Even if, as some courts apparently believe, the jury is to determine the facts necessary to establish admissibility, the instructions by the trial court here at the conclusion of the trial assigned the jury this task under standards far more stringent than petitioner was entitled to.[11] The court's failure to instruct the jury before any statement was introduced that it was to be considered conditionally and was to be erased from their minds if proof independent of the statements failed to establish the conspiracy and petitioner's role in it by the end of the trial did not impair the jury's function; indeed, giving such conditional instructions would tend hopelessly to confuse the jury by requiring

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(C.A. 3)), the appropriate standard is not at issue here, since independent evidence in this case amply established the conspiracy and petitioner's participation under any of the suggested tests. Thus, much of the testimony linking petitioner to the conspiracy and distribution was not hearsay but eyewitness observation of, for example, petitioner's participation in the opening and testing of heroin (Deposition of Adams, pp. 81-91), petitioner's statements directly to a witness that he was going to fly to Thailand to secure heroin (*id.* at 103-109), and his discussion with the witness and others of the sale of the heroin in California (Deposition of Gamble, pp. 42-44).

[11]The instruction given by the court conferred a greater benefit than the law requires, since the jury was told that it could consider the hearsay statements against petitioner only if it made a preliminary determination that evidence apart from the hearsay established the conspiracy and petitioner's role in it beyond a reasonable doubt. As the court of appeals noted, under the theory of the instruction given "there would be no occasion to resort to the declarations; the evidence would not be considered unless the defendant's guilt had already been resolved" (Pet. App. 30).

it, in the court of appeals' words (Pet. App. 31), to try to "compartmentaliz[e] * * * distinct evidence weighing standards" during the course of the trial.[12]

b. Petitioner's assertion (Pet. 25) that review of the decision below is warranted to resolve a conflict among the circuits is incorrect. The purported conflict is based primarily on the decision of the Fifth Circuit in *United States* v. *Apollo*, 476 F. 2d 156, 162, where, in the context of a conspiracy prosecution with "marginally sufficient nonhearsay evidence" of the conspiracy, the court held that cautionary instructions must be given either at the beginning of the trial or the first time hearsay statements are introduced.[13]

The substantial independent evidence of the conspiracy and petitioner's role in it distinguishes *Apollo* from the

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[12]Moreover, since the admissibility of the hearsay statements against petitioner was clearly established (see note 10, *supra*), the court of appeals correctly held that any failure to give a conditional cautionary instruction during the trial, if erroneous, was harmless error (Pet. App. 33).

[13]*United States* v. *Buschman*, 527 F. 2d 1083 (C.A. 7), cited by petitioner (Pet. 25), in fact supports the decision below. There the court clearly rejected the *Apollo* rule, held that the decision of when to issue a requested cautionary instruction was within the discretion of the trial court, and upheld the conviction even though, as here, the instruction was given at the end of the trial.

Although *United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948, also relied on by petitioner, purported to adopt the *Apollo* rule in the First Circuit, the court in that case held that the failure to give an adequate cautionary instruction at any time in the trial was not plair error requiring reversal in the absence of objection. See also *United States* v. *DeJesus*, 520 F. 2d 298 (C.A. 1), certiorari denied, 423 U.S. 865. Moreover, the First Circuit has recently recognized that the admissibility of co-conspirator statements is an evidentiary question for the court under the Federal Rules of Evidence, and that its contrary assumption in *Honneus* is not correct under the Rules. *United States* v. *Petrozziello*, 548 F. 2d 20, 22-23.

instant case, as subsequent Fifth Circuit decisions indicate. Thus, in *United States* v. *Leaman*, 546 F. 2d 148, 150 (C.A. 5), the court limited its holding in *Apollo* to the "extraordinary circumstances" of that case, observing that "the evidence of Apollo's connection with the conspiracy was entirely dependent upon hearsay statements of coconspirators." See also *United States* v. *Moore*, 505 F. 2d 620 (C.A. 5), certiorari denied, 421 U.S. 918. Moreover, since the court below held that even if the timing of the instructions were error, the error was harmless (Pet. App. 33), there is no conflict between the decision here and *Apollo*.

In any event, we submit that as a principal of general application, the *Apollo* rule is plainly erroneous. *Apollo* incorrectly relied on *Lutwak* v. *United States*, 344 U.S. 604, for the proposition that limiting instructions are required before the introduction of any co-conspirator statements. The statements at issue in *Lutwak*, however, were made after the conspiracy had ended and thus, under settled law, were admissible only against the declarant and not against co-conspirators. The Court's holding that cautionary instructions are necessary at the time of their admission was clearly limited to those declarations that as a matter of law are not admissible against one or more of the defendants. 344 U.S. at 619. The Court did not hold that the issue of admissibility is for the jury to decide, that a cautionary instruction is necessary when a statement is admissible against the defendant, or that a conditional cautionary instruction is required if facts have not yet established the extent to which the statement may be admissible.

However, since the Fifth Circuit has indicated a substantial withdrawal from the broad application of the *Apollo* rule and since the instant case is in any event distinguishable, further review of the issue in the context of this case is unnecessary.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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